

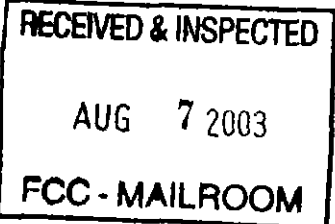


The Eastern Band of Cherokee Indians

DOCKET FILE COPY ORIGINAL

The Honorable Leon D. Jones, Principal Chief

The Honorable Carroll J. Crowe, Vice-Chief



Bob Blankenship

Chairman

Yellow Hill Township

August 4, 2003

Larry Blythe

Vice Chairman

Welltown Township

Michael Powell, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Tribal Council Members

Teresa Bradley McCoy

Big Cove Township

RE: WT Docket No. 03-128: FCC 03-125

Richard Panther

Big Cove Township

Dear Chairman Powell:

Jim Owle

Birdtown Township

On behalf of the Eastern Band of Cherokee Indians the Tribal Historic Preservation Office (EBCI/THPO) would like to address the consultation requirements outlined in the proposed Nationwide Programmatic Agreement (NWP) for the review of all communications undertakings, as required by Section 106 of the National Historic Preservation Act 36 CFR 800.

Albert Crowe

Birdtown Township

Marie L. Junaluska

Painttown Township

The EBCI/THPO appreciates the FCC's willingness to meet with tribal leaders at NCAI and USET leaders at various Indian conferences to discuss and address the draft NWP. In general the EBCI/THPO finds that the consultation efforts outlined are in keeping with the government-to-government relationship required to exist between the United States government and sovereign Indian Nations. Furthermore, although the initial NWP document left tribes out of project consultation, the FCC has resolved this oversight to the EBCI/THPO's satisfaction. That said, while we can agree on some of the language of the NWP we still find there to be several critical issues that need resolution prior to the finalization of the document.

Fonmye Satunooke

Painttown Township

Glenda Sanders

Snowbird &
Cherokee Co. Township

Brenda L. Norville

Snowbird &
Cherokee Co. Township

The EBCI/THPO has reviewed the NWP for a second time, and unfortunately have found that many of our original concerns were not addressed in the latest draft of the NWP. First, while the EBCI supports the development of a nationwide communications infrastructure, we cannot condone the destruction of our heritage in the process of developing such a system and its requisite facilities. This document continues to undervalue our cultural, historical, religious, and sacred grounds which have great significance to us. To this end the EBCI/THPO recommends that FCC include Traditional Cultural Properties (TCP) and

Dwaine Jackson

Welltown Township

Alan B. Ensley

Yellow Hill Township

88 Council House Loop • P.O. Box 455 • Cherokee, N.C. 28719

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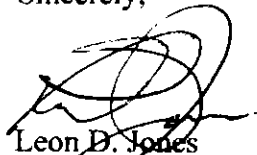
Religious/Sacred Sites throughout this document whenever the presence or study of historic properties or cultural resources is discussed.

Second the EBCI/THPO still has great discomfort with a number of projects proposed to be excluded for the Section 106 consultation process. The categorical of exclusion of collocations, for example, denies the fact that even minimal soil disturbance outside of a previously disturbed area (either horizontally or vertically) can damage importance and significance to tribes. Also, we would remind FCC that in some instances a previously disturbed site may still possess significance to a tribe, as some levels of significance are unrelated to the physical integrity of the space.

Third, the EBCI/THPO feels the most important aspect of this NHPA, is the assurance that the FCC and its applicants will consult with Indian Tribes whenever a Federal undertaking has the potential to affect properties of cultural and religious significance to a tribe. Recognizing the importance of consulting Tribes the new NHPA provides two alternatives in Part IV for consulting with tribes. The EBCI/THPO strongly recommends that the NHPA implements Alternative B. This alternative, proposed after coordination with USET and NCAI, provides a very straightforward yet thorough mechanism to assure adequate tribal consultation and direct and timely input. As Alternative A was developed by a working group without input by tribal entities, we find this alternative to establish a complicated process burdened with inconsistency and too little tribal input. Alternative B fully addresses the concerns of affected tribes regarding consultation and is the only alternative that meets both the letter and spirit of the NHPA (as amended). Furthermore, if it is indeed the goal of FCC to respect tribal sovereignty and acknowledge our cultural and religious/sacred sites, it is necessary to accept and implement Alternative B for this NHPA.

We appreciate the opportunity to provide comments about the NHPA and that you carefully review the EBCI/THPO's comments which are on the enclosed (in bold italic). If you have any questions about the information we have provided, please contact Lora Kay Oxendine-Taylor of our THPO staff at (828) 497-1588 or email her at loratayl@nc-chokeee.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Leon D. Jones", with a stylized flourish at the end.

Leon D. Jones
Principle Chief of the Eastern Band of Cherokee Indians

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED & INSPECTED

AUG 7 2003

FCC - MAILROOM

In the matter of)

NATIONWIDE PROGRAMMATIC)
AGREEMENT REGARDING THE)
SECTION 106 NATIONAL HISTORIC)
PRESERVATION ACT REVIEW PROCESS)

WT Docket No 03-128

Notice of Proposed Rulemaking

Adopted: May 27, 2003

Released: June 9, 2003

Comments due: August 8, 2003

Replies due: September 8, 2003

By the Commission Chairman Powell issuing a statement

I. INTRODUCTION AND BACKGROUND

1 In this Notice of Proposed Rulemaking ("NPRM"), we seek comment on a draft Nationwide Programmatic Agreement ("Nationwide Agreement") among the Federal Communications Commission ("Commission"), the Advisory Council on Historic Preservation ("Council"), and the National Conference of State Historic Preservation Officers ("Conference") that would tailor and streamline procedures for review of certain Undertakings for communications facilities under the National Historic Preservation Act of 1966 ("NHPA"),¹ as well as a related revision of the Commission's Rules.² In November 2001, representatives of the Commission, Council and Conference, American Indian tribes, the communications industry, and historic preservation consultants, as part of a working group sponsored by the Council, began drafting a proposed Nationwide Agreement. Consistent with Section 800.14(b)³ of the Council's rules and Section 1.1307(a)(4) of the Commission's rules,⁴ the draft

¹ See 16 U.S.C. § 470 *et seq.* An "Undertaking" subject to review under the NHPA is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of the agency, (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval, and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. § 470w(7).

² The proposed Nationwide Agreement would incorporate an existing Programmatic Agreement that excludes most collocations of antennas on existing structures from routine historic preservation review. See 16 FCC Red 5574 (Wireless Tel. Bur. 2001).

³ 36 C.F.R. § 800.14(b).

⁴ 47 C.F.R. § 1.1307(a)(4).

Nationwide Agreement is intended to tailor the Section 106 review⁵ in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission Undertakings.⁶ At the same time, the parties intend to advance and preserve the goal of the NHPA to protect historic properties, including historic properties to which Indian tribes and Native Hawaiian organizations ("NHOs") attach religious and cultural significance.

II. DISCUSSION

2. We request comment on the draft Nationwide Agreement, attached as Appendix A to this NPRM. In particular, we seek comment on several issues that members of the Working Group have specifically raised during the course of negotiating the current draft Nationwide Agreement. For example, members of the Working Group have proposed certain modifications to the language in the draft Nationwide Agreement regarding exclusion of certain Undertakings from routine Section 106 review.⁷ These and other issues on which the members of the Working Group did not reach full consensus are indicated in footnotes throughout the draft Nationwide Agreement. We seek comment on these and any other issues related to the draft Nationwide Agreement, including issues related to the potential economic impact of the draft Nationwide Agreement on small entities

3. We also request comment regarding how the draft Nationwide Agreement should be crafted consistent with the Commission's government-to-government relationship with and trust responsibility to federally recognized Indian tribes (including Alaska Native Villages),⁸ and statutory and regulatory provisions governing the Commission's relationship with such Indian tribes and NHOs.⁹ Several issues in this regard have been brought to our attention both through tribal participation in the Working Group and through Commission staff consultation with the United South and Eastern Tribes, Inc. For instance, do the NHPA, the Council's rules or other governing principles require notification or more, prior to construction, to Indian tribes and NHOs with historic associations to the area in which an Undertaking is to occur, even though the parties to a Nationwide Agreement identify certain classes of Undertakings as unlikely to have an effect on historic properties and therefore excluded from routine review?¹⁰ Similarly, should the Nationwide Agreement prescribe procedures for licensees and applicants to invite the participation of Indian tribes and NHOs in the Section 106 process, or should it recommend that, as an alternative to direct Commission consultation on each site, the parties implement alternative processes pursuant to guidance to be provided separately by the

⁵ 16 U.S.C. § 470f

⁶ The Commission's environmental rules currently treat construction of licensed communications facilities as "Undertakings." An illustrative list of Commission activities in relation to which Undertakings covered by the draft Nationwide Agreement may occur is attached as Attachment 2 to Appendix A.

⁷ See Draft Nationwide Agreement Section III.

⁸ See In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Red 4078, 4080 (2000).

⁹ See 16 U.S.C. § 470a(d), 36 C.F.R. § 800.2(c)(2), 47 C.F.R. § 1.1308(b) Note (when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe).

¹⁰ See Draft Nationwide Agreement at Section III B.

Commission after consultation with Indian tribes and NHOs?¹¹ We seek comment on these issues

4 In addition, we request comment regarding the treatment of Section 106 reviews that are in process at the time a Nationwide Agreement becomes effective. For example, to what extent should the timelines, processes and standards in a Nationwide Agreement replace the Council's rules (36 C.F.R. Part 800) for Section 106 reviews that are pending before a SHPO/IHPO, or at other stages in the process, on the date that a Nationwide Agreement goes into effect? We seek comment on this and other transitional issues.

5. Finally, in conjunction with the proposed execution of the Nationwide Agreement, we propose to revise the Note to Section 1.1307(a)(4) of our rules.¹² Under Section 1.1307(a)(4), applicants are required to evaluate whether their proposed facilities may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places and, if so, to file an Environmental Assessment and obtain a Finding of No Significant Impact (or procure completion by the Commission of an Environmental Impact Statement) prior to construction.¹³ The Note to Section 1.1307(a)(4) provides guidance as to how applicants should perform this evaluation consistent with the NHPA. In order to make clear that the procedures in the Nationwide Agreement will be binding on applicants, and that non-compliance with these procedures would subject a party to potential enforcement action by the Commission, we propose to amend the Note to Section 1.1307(a)(4) to read as follows:

The National Register is updated and re-published in the FEDERAL REGISTER each year in February. To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 66 FR 17554, and the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, __ Fed. Reg. __.

We seek comment on this proposed revision to our rules.

III. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

6 This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁴ Persons making oral *ex parte*

¹¹ *Id.* Section IV, Alternatives A and B

¹² 47 C.F.R. § 1.1307(a)(4) Note

¹³ *Id.* § 1.1307(a)(4) *see also* 47 C.F.R. §§ 1.1308, 1.1311

¹⁴ *Id.* §§ 1.1200-1.1216

presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹⁵ Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.¹⁶

B. Comment Filing Procedures

7 Pursuant to sections 1.415 and 1.419 of the Commission's rules,¹⁷ interested parties may file comments on or before **August 8, 2003**, and may file reply comments on or before **September 8, 2003**. All filings should refer to Docket No. 03-128. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹⁸ Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket numbers, which in this instance is Docket No. 03-128. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply. Or you may obtain a copy of the SCII Electronic Transmittal Form (FORM-ET) at www.fcc.gov/e-file/email.html.

8 Parties who choose to file by paper must file an original and six copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

9 This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18,

¹⁵ See *Id.* § 1.1206(b)(2).

¹⁶ See *Id.* § 1.1206(b). Under the Council's rules, the Council and Conference must be parties to the Nationwide Agreement. Therefore, for purposes of the Commission's *ex parte* rules, in this proceeding we shall treat presentations from these entities and their staffs as exempt presentations under 47 C.F.R. § 1.1204(a)(5).

¹⁷ See *Id.* § 1.415, 1.419.

¹⁸ See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554

10. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8.00 a.m to 5.30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters actually goes to our Capitol Heights facility for screening prior to delivery at the Commission

If you are sending this type of document or using this delivery method...	It should be addressed for delivery to...
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110 Washington, DC 20002 (8.00 to 7:00 p.m)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m to 5.30 p m)
United States Postal service first-class mail, Express Mail, and Priority Mail	445 12 th Street, SW Washington, DC 20554

11. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the filing window at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket numbers, in this case, Docket No 03-128), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy -- Not an Original ". Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W , CY-B402, Washington, DC 20554

12. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W ,

CY-B402, Washington, D C 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com. Commission staff will forward copies of all comments received to the Council and the Conference

13. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.48 and all other applicable sections of the Commission's rules.¹⁹ We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the NPRM in order to facilitate our internal review process.

C. Initial Regulatory Flexibility Analysis

14. The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), attached as Appendix B, for the NPRM, as required by the Regulatory Flexibility Act. The Commission requests written public comment on the analysis. Comments must be filed in accordance with the same filing deadlines as comments filed in response to the NPRM, and must have a separate and distinct heading designating them as responses to the IRFA. The Consumer and Governmental Affairs Bureau, Reference Information Center shall send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).²⁰

D. Paperwork Reduction Act

15. This NPRM may contain proposed information collections. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995.²¹ Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

16. Written comments by the public on the proposed information collections are due **[60 days from date of publication in the Federal Register.]** Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the proposed and/or modified information collections on or before **[60 days from date of**

¹⁹ See 47 C.F.R. § 1.48.

²⁰ See 5 U.S.C. 603(a).

²¹ See Pub. L. No. 104-13.

publication in the Federal Register.] In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith-B.Herman@fcc.gov and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to Kim_A_Johnson@omb.eop.gov or by fax to 202-395-5167.

E. Further Information

17 For further information about this proceeding, contact Frank Stilwell at 202-418-1892, fstilwel@fcc.gov, or Amy Pike at 202-418-1331, apike@fcc.gov. Media inquiries should be directed to Meribeth McCarrick at 202-418-1654, mmccarr@fcc.gov.

IV. ORDERING CLAUSES

18 IT IS ORDERED, pursuant to Sections 1, 4(i), 303(q), 303(r), 309(a), 309(j) and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(q), 303(r), 309(a), 309(j) and 319, Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470f, and Section 800.14(b) of the rules of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.14(b), that this NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

19 IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

**NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF
EFFECTS ON HISTORIC PROPERTIES FOR
CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL
COMMUNICATIONS COMMISSION**

[Month Day], 2003

INTRODUCTION

WHEREAS, Section 106 of the National Historic Preservation Act of 1966, as amended ("NHPA") (codified at 16 U.S.C. § 470f), requires federal agencies to take into account the effects of ***Federal*** Undertakings on Historic Properties (see Section II, below), included in or eligible for inclusion in the National Register of Historic Places ("National Register"), and to afford the Advisory Council on Historic Preservation ("Council") a reasonable opportunity to comment with regard to such Undertakings; and

WHEREAS, under the authority granted by Congress in the Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*), the Federal Communications Commission ("Commission") establishes rules and procedures for the licensing of non-federal government communications services, and the registration of certain antenna structures in the United States and its Possessions and Territories; and

WHEREAS, Congress and the Commission have deregulated or streamlined the application process regarding the construction of individual Facilities in many of the Commission's licensed services; and

WHEREAS, under the framework established in the Commission's environmental rules, 47 C.F.R. §§ 1.1301-1.1319, Commission licensees and applicants for authorizations and antenna structure registrations ("Applicants") are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment ("EA") in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect Historic Properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization ("NHO") that meet the National Register criteria; and

WHEREAS, the Council has adopted rules implementing Section 106 of the NHPA (codified at 36 C.F.R. Part 800) and setting forth the process, called the "Section 106 process," for complying with the NHPA; and

WHEREAS, pursuant to the Commission's rules and the terms of this Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Undertakings

Approved by the Federal Communications Commission ("Nationwide Agreement"), Applicants have been authorized, consistent with the terms of the memorandum from the Council to the Commission, titled "Delegation of Authority for the Section 106 Review of Telecommunications Projects," dated September 21, 2000, to initiate, coordinate, and assist the Commission with compliance with many aspects of the Section 106 review process for their Facilities, and

WHEREAS, in August 2000, the Council established a Telecommunications Working Group (the "Working Group") to provide a forum for the Commission, the Council, the National Conference of State Historic Preservation Officers ("Conference"), individual State Historic Preservation Officers ("SHPOs"), Tribal Historic Preservation Officers ("THPOs"), other tribal representatives, communications industry representatives, and other interested members of the public to discuss improved Section 106 compliance and to develop methods of streamlining the Section 106 review process, and

WHEREAS, Section 800.14(b) of the Council's regulations (36 C.F.R. § 800.14(b)) allows for programmatic agreements to streamline and tailor the Section 106 review process to particular federal programs, if they are consistent with the Council's regulations; and

WHEREAS, the Commission, the Council, and the Conference executed on March 16, 2001, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (the "Collocation Agreement"), in order to streamline review for the collocation of antennas on existing towers and thereby reduce the need for the construction of new towers (Attachment 1 to this Nationwide Agreement), and

WHEREAS, the Council, the Conference, and the Commission now agree it is desirable to further streamline and tailor the Section 106 review process for Facilities that are not excluded from Section 106 review under the Collocation Agreement while protecting Historic Properties that are either listed in or eligible for listing in the National Register; and

WHEREAS, the Working Group agrees that a nationwide programmatic agreement is a desirable and effective way to further streamline and tailor the Section 106 review process as it applies to Facilities; and

WHEREAS, this Nationwide Agreement will, upon its execution by the Council, the Conference, and the Commission, constitute a substitute for the Council's rules with respect to certain Commission Undertakings; and

WHEREAS, the Commission has consulted with Indian tribes and United South and Eastern Tribes regarding this Nationwide Agreement; and

WHEREAS, this Nationwide Agreement provides for appropriate public notification and participation in connection with the Section 106 process; and

WHEREAS, Section 101(d)(6) of the NIIPA provides that federal agencies “shall consult with any Indian tribe or Native Hawaiian organization” that attaches religious and cultural significance to properties of traditional religious and cultural importance that may be determined to be eligible for inclusion in the National Register that might be affected by a federal undertaking (16 U.S.C. § 470a(d)(6)), and

WHEREAS, the Commission has adopted a “Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes” dated June 23, 2000, pursuant to which the Commission: recognizes the unique legal relationship that exists between the federal government and Indian tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions; affirms the federal trust relationship with Indian tribes, and recognizes that this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian tribes, commits to working with Indian tribes on a government-to-government basis consistent with the principles of tribal self-governance; commits, in accordance with the federal government’s trust responsibility, and to the extent practicable, to consult with tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect tribal governments, their land and resources; strives to develop working relationships with tribal governments, and will endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission’s regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes, and

WHEREAS, the Commission does not delegate under this Programmatic Agreement any portion of its responsibilities to Indian tribes and NHOs, including its obligation to consult under Section 101(d)(6) of the NIIPA; and

WHEREAS, the terms of this Nationwide Agreement are consistent with and do not attempt to abrogate the rights of Indian tribes or NHOs to consult directly with the Commission regarding the construction of Facilities; and

WHEREAS, the execution and implementation of this Nationwide Agreement will not preclude Indian tribes or NHOs, SIPO/THPOs, local governments, or members of the public from filing complaints with the Commission or the Council regarding effects on Historic Properties from any Facility or any activity covered under the terms of the Nationwide Agreement; and

WHEREAS, Indian tribes and NHOs may request Council involvement in Section 106 cases that present issues of concern to Indian tribes or NHOs (see 36 C.F.R. Part 800, Appendix A, Section (c)(4)), and

WHEREAS, the Council, the Conference and the Commission recognize that Applicants’ use of qualified professionals experienced with the NIIPA and Section 106 can streamline the review process and minimize potential delays, and

WHEREAS, the Commission has created a position and hired a cultural resources professional to assist with the Section 106 process,

NOW THEREFORE, in consideration of the above provisions and of the covenants and agreements contained herein, the Council, the Conference and the Commission (the "Parties") agree as follows:

I. APPLICABILITY AND SCOPE OF THIS NATIONWIDE AGREEMENT

- A This Nationwide Agreement (1) excludes from Section 106 review certain Undertakings involving the construction and modification of Facilities, and (2) streamlines and tailors the Section 106 review process for other Undertakings involving the construction and modification of Facilities. An illustrative list of Commission activities in relation to which Undertakings covered by this Agreement may occur is provided as Attachment 2 to this Agreement.
- B This Nationwide Agreement applies only to federal Undertakings as determined by the Commission ("Undertakings"). The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NIIPA. Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking. Maintenance and servicing of Towers, Antennas, and associated equipment are not deemed to be Undertakings subject to Section 106 review. As requested in the last draft by the EBCI-THPO we are still concerned if 'maintenance and servicing' are these the only two activities not considered to be undertakings? We find that this is unclear and needs addressing in the event that there are more exemptions that should be addressed in the agreement.
- C This Agreement does not apply to Antenna Collocations that are exempt from Section 106 review under the Collocation Agreement (see Attachment 1). Pursuant to the terms of the Collocation Agreement, such Collocations shall not be subject to the Section 106 review process and shall not be submitted to the SHPO/THPO for review. This Agreement does apply to collocations that are not exempt from Section 106 review under the Collocation Agreement. The EBCI-THPO finds this section to be very confusing treatment of this subject. A need for clarity to which co-locations require review and which do not under this agreement needs to be addressed. In terms of exemptions, it has not been our experience that all co-locations should be exempt from Section 106 review. When co-locations requires new ground disturbance in a previous undisturbed and universal area a Cultural Resource review should be completed/required. This Agreement does not apply on "tribal lands" as defined under Section 800.16(x) of the Council's regulations, 36 C.F.R. § 800.16(x) ("Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.") This Nationwide Agreement, however, will apply on tribal lands should a tribe, pursuant to appropriate tribal procedures and upon reasonable notice to the

Council, Commission, and appropriate SHPO/THPO, elect to adopt the provisions of this Nationwide Agreement. Where a tribe that has assumed SHPO functions pursuant to Section 101(d)(2) of the NHPA (16 U.S.C. § 470(d)(2)) has agreed to application of this Nationwide Agreement on tribal lands, the term SHPO/THPO denotes the Tribal Historic Preservation Officer with respect to review of proposed Undertakings on those tribal lands. Where a tribe that has not assumed SHPO functions has agreed to application of this Nationwide Agreement on tribal lands, the tribe may notify the Commission of the tribe's intention to perform the duties of a SHPO/THPO, as defined in this Nationwide Agreement, for proposed Undertakings on its tribal lands, and in such instances the term SHPO/THPO denotes both the State Historic Preservation Officer and the tribe's authorized representative. In all other instances, the term SHPO/THPO denotes the State Historic Preservation Officer

- D This Nationwide Agreement governs only review of Undertakings under Section 106 of the NHPA. Applicants completing the Section 106 review process under the terms of this Nationwide Agreement may not initiate construction without completing any environmental review that is otherwise required for effects other than historic preservation under the Commission's rules (*See* 47 C.F.R. §§ 1.1301-1.1319). Completion of the Section 106 review process under this Nationwide Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties, except for Undertakings that have been determined to have an adverse effect on Historic Properties and that therefore require preparation and filing of an Environmental Assessment (*See* 47 C.F.R. § 1.1307(a)(4)).
- E This Nationwide Agreement does not govern any Section 106 responsibilities that agencies other than the Commission may have with respect to those agencies' federal Undertakings.

II. DEFINITIONS

- A. The following terms are used in this Nationwide Agreement as defined below:
 - 1. Antenna. An apparatus designed for the purpose of emitting radio frequency ("RF") radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna. For most services, an Antenna will be mounted on or in, and is distinct from, a supporting structure such as a Tower, structure or building. However, in the case of AM

broadcast stations, the entire Tower or group of Towers constitutes the Antenna for that station. For purposes of this Nationwide Agreement, the term Antenna does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules.

2. Applicant. A Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.
3. Area of Potential Effects ("APE"). The geographic area or areas within which an Undertaking may have an effect on Historic Properties, if such properties exist. The EBCI-THPO recommends that the words 'direct indirect' and cumulative be used next to the word "effect." This is a basic requirement and should be required in this PA.
4. Collocation. The mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes.
5. Effect. An alteration to the characteristics of a Historic Property qualifying it for inclusion in or eligibility for the National Register.
6. Experimental Authorization. An authorization issued to conduct experimentation utilizing radio waves for gathering scientific or technical operation data directed toward the improvement or extension of an established service and not intended for reception and use by the general public. "Experimental Authorization" does not include an "Experimental Broadcast Station" authorized under Part 74 of the Commission's rules.
7. Facility. A Tower or an Antenna. The term Facility may also refer to a Tower and its associated Antenna(s).
8. Historic Property. Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register TCP, or AIRFA/E.O. 13007 criteria.
9. National Register. The National Register of Historic Places, maintained by the Secretary of the Interior's office of the Keeper of the National Register.
10. Special Temporary Authorization. Authorization granted to a permittee or licensee to allow the operation of a station for a limited

period at a specified variance from the terms of the station's permanent authorization or requirements of the Commission's rules applicable to the particular class or type of station.

- 11 Submission Packet The document to be submitted initially to the SHPO/THPO to facilitate review of the Applicant's findings and any determinations with regard to the potential impact of the proposed Undertaking on Historic Properties in the APE. There are two Submission Packets: (a) The New Tower Submission Packet (Form NT) (See Attachment 3) and (b) The Collocation Submission Packet (Form CO) (See Attachment 4). Any documents required to be submitted along with a Form are part of the Submission Packet.
- 12 Tower. Any structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein

- B. All other terms not defined above or elsewhere in this Agreement shall have the same meaning as set forth in the Council's rules section on Definitions (36 C.F.R. § 800.16) or the Commission's rules (47 C.F.R. §§ 1.1301-1.1319)
- C. For the calculation of time periods under this Agreement, "days" mean "calendar days." Any time period specified in the Agreement that ends on a weekend or a Federal or State holiday is extended until the close of the following business day
- D. Written communications include communications by e-mail or facsimile.

III. UNDERTAKINGS EXCLUDED FROM SECTION 106 REVIEW¹

- A. Undertakings that fall within the provisions listed in the following sections III A.1 through III A.6 are excluded from Section 106 review by the

¹ In general, Cellular Telecommunications and Internet Association, ("CTIA"), Personal Communications Industry Association ("PCIA") and National Association of Broadcasters ("NAB") are concerned that exclusions should not become so diluted or convoluted as to render them ineffective as streamlining measures. CTIA is particularly concerned that processed language that directly or indirectly results in an exemption to the exclusion would result in a lengthy Section review process. The EBCI-THPO feels that this comment intends to exclude many projects from Section 106 and the Historic Preservation Rules and Regulation unnecessarily. Section 106 process is not lengthy once the complete appropriate and needed information is sent to Tribes/THPO'S in an efficient and timely manner

SHPO/THPO and Tribes w/o THPO's, the Commission, and the Council, and, accordingly, shall not be submitted to the SHPO/THPO and Tribes w/o THPO's for review [unless an Indian tribe indicates pursuant to Section III.B that a Historic Property of traditional religious or cultural importance to that tribe may be adversely affected by the proposed Undertaking].² Applicants should retain documentation of their determination that an exclusion applies to an Undertaking. Concerns regarding the application of these exclusions from Section 106 review may be presented to and considered by the Commission pursuant to Section XI The EBCI/THPO supports and agrees with the comments in III B submitted by the Navajo Nation.

1. Modification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement. Once again the EBCI/THPO request that "substantial" be defined
2. Construction of a replacement for an existing communications tower and any associated excavation that does not substantially increase the size of the existing tower under elements 1-3 of the definition as defined in the Collocation Agreement (See Attachment 1 to this Agreement, Stipulation 1.c.1-3) and that does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries and any access or utility easement related to the site. Once again the EBCI-THPO request that "substantial" be defined. In some cases, 30 feet is too much and may constitute an effect.
3. Construction of any temporary communications Tower, Antenna structure, or related Facility, including but not limited to the following:
 - a. A Tower or Antenna authorized by the Commission for a temporary period, such as any Facility authorized by a Commission grant of Special Temporary Authority ("STA") or emergency authorization;
 - b. a cell on wheels (COW) transmission Facility;
 - c. a broadcast auxiliary services truck, TV pickup station, remote pickup broadcast station (e.g., electronic newsgathering vehicle) authorized under Part 74 or temporary fixed or transportable earth station in the fixed

² See bracketed discussion at the end of Section III

- satellite service (e.g., satellite newsgathering vehicle) authorized under Part 25;
- d. a temporary ballast mount Tower involving no excavation;
- e. Any Facility authorized by a Commission grant of an experimental authorization.³

For purposes of this subsection 3, the term "temporary" means "for no more than twenty-four months duration except in the case of those Facilities associated with national security." *The EBCI/THPO has great concern with this section. We would like this to be addressed: a - e: do none of these proposed activities require earth disturbance?*

- 4. Construction of a Facility 400 feet or less in overall height above ground level on a property that is in actual use solely for industrial, commercial, and/or government-office purposes and that occupies an area of 10,000 square feet or more, or that together with adjacent industrial, commercial, and/or government-office properties occupies an area of 10,000 square feet or more, where no structure 45 years or older is located within 200 feet⁴ of the proposed Facility, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4 below. *Once again the EBCI/THPO recommends that in addition to structures over 45 years old TCP/Sacret sites should be listed (The distance from which construction/excavation can occur must be determined by the tribe providing the information). In addition, when the phrase previously disturbed is used, include both the words "horizontally" and "vertically" should be place into this agreement.*
- 5. Construction of a Facility 400 feet or less in overall height above ground level located in or within 200 feet of the outer boundary of any of the following, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C 4 below.
 - a. A right-of-way designated by a government for the location of communications Towers or above-ground utility transmission lines and associated structures and equipment, and in active use for such purpose;
 - b. An existing limited access Interstate Highway with a speed limit of 55 MPH or higher; or

³ The Commission requests comment on whether experimental authorizations should be limited to 24 months.

⁴ The Ohio SHPO suggests a distance of 400 feet or, alternatively, a distance equal to the height of the proposed Facility

- c. A railway corridor in active use for passenger trains;

However, an Undertaking shall not be excluded from review under this provision if (1) the existing highway, railway line, or communications structure is included in the National Register and the setting or other visual element is identified as a character-defining feature of eligibility on the National Register nomination; (2) the proposed Facility lies within 200 feet of any other structure that is 45 years or older; or (3) the proposed Facility lies within 3/4 mile of and is visible from a unit of the National Park System that is listed or eligible for listing in the National Register, or a National Historic Landmark.⁵ *The EBCI/THPO continues to request that the comments above concerning TCP and secret sites be included (see # 4 above).*

6. Construction of a facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate tribes, as having limited potential to affect Historic Properties. Such designation shall be documented and made available for public review.

- B. [Prior to commencing construction of any Facility excluded from Section 106 review under Section III A.1, III.A.2., or III.A.4. through III.A.6, an Applicant shall notify any Indian tribe with aboriginal and/or historic associations to the area in which the Undertaking is to occur and provide the tribe a reasonable opportunity to indicate that the Undertaking may adversely affect a Historic Property of traditional religious or cultural importance to that tribe. If the tribe indicates that such an adverse effect may occur, the Applicant shall engage the tribe pursuant to Section IV and shall review the Undertaking and submit it to the SHPO/THPO for review under this Nationwide Agreement notwithstanding the exclusion, unless the tribe subsequently concludes that the Historic Property would not be adversely affected]

[Section III B was proposed by the Navajo Nation. Section 101(d)(6)(B) of the NHPA states that, "[i]n carrying out its responsibilities under Section 106,

⁵ The Conference has proposed a modification to Section III A 5 that would allow individual SHPOs to "opt out" of this exclusion where historic properties are likely to be present in such corridors. SHPO opt out would be contingent on agreement to consult with applicants and engage in good faith efforts to identify alternate locations for the location of communications facilities pursuant to Section III A 6. The National Trust is in support of the Conference draft "opt-out" language for railway corridors in active use for passenger trains. CTIA objects to an opt-out provision because it reverts back to addressing key exclusions on a state-by-state basis with no guarantees that the parties will reach consensus. CTIA also expressed its concern that the proposed opt-out provision would result in an additional 12-18 month negotiation process with each state that chooses to opt out in addition to what has already been a lengthy process, i.e., two years.

a Federal agency shall consult with any Indian tribe or native Hawaiian Organization that attaches religious and cultural significance to [Historic Properties]." The Navajo Nation believes that this proposed provision is a minimum necessary accommodation in light of Section 101(d)(6)(B).]

[CTIA, PCIA and NAB are concerned that the Navajo Nation's proposed language provides additional notice requirements rather than streamlining excluded Undertakings from review. PCIA argues that from a practical standpoint, an exclusion that includes a tribal notice requirement may be tantamount to no exclusion at all. Moreover, these parties, the Conference, and the Council maintain that this Nationwide Programmatic Agreement is not the appropriate vehicle to address the notice issue, but that the Commission in consultation with Indian tribes should develop agency procedures with respect to tribal consultation. The Council notes that other programmatic agreements have excluded Undertakings off tribal lands from review without a provision for tribal notice. USET states that tribes were not consulted in the development of those programmatic agreements.]

[We seek comment on the Navajo Nation's proposal, and on this draft Nationwide Agreement generally, in light of Section 101(d)(6)(B).]

IV. PARTICIPATION OF INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS IN UNDERTAKINGS OFF TRIBAL LANDS; TRIBAL CONSULTATION – **Alternative A**⁶

- A. As a part of its responsibilities in connection with Section 106 of the NHPA (16 U.S.C. 470f) and the regulations of the Council (36 C.F.R. Part 800) and pursuant to Section 101(d)(6) of the NHPA (16 U.S.C. § 470(a)(d)(6)), the Commission recognizes its responsibility to consult with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by an Undertaking. Through its rules and the terms of this Agreement, the Commission has authorized Applicants to initiate contacts with Indian tribes and NHOs on its behalf, and to conclude the process of tribal participation consistent with this Agreement where the tribe has not requested government-to-government consultation

⁶ This alternative was discussed in the Telecommunications Working Group and represents the collective effort of Working Group members, including tribal representatives, to address issues raised in the Working Group discussions. The Working Group did not have an opportunity to address the proposal in Alternative B prior to publication for comment.

- B. Consistent with their right to government-to-government consultation, tribal authorities may request Commission consultation on any or all matters at any time, including when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO.
- C. The Commission recognizes that Indian tribes exercise inherent sovereign powers over their members and territory. The Commission also recognizes the unique relationship that the federal government has with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Each Applicant must recognize these facts and conduct all communications with Indian tribes in a sensitive manner, respectful of tribal sovereignty. Contacts shall be directed to the appropriate representative designated or identified by the tribal government or other governing body.
- D. Applicants should be aware that frequently, Historic Properties of religious and cultural significance to Indian tribes and NHOs are located on ancestral, aboriginal, or ceded lands of such tribes and organizations and Applicants should take this into account when complying with their responsibilities. Accordingly, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to Historic Properties that may be affected by an Undertaking. Such reasonable and good faith efforts may include, but are not limited to, seeking relevant information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs ("BIA"), or, where applicable, any federal agency with land holdings within the state (e.g., the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property, as described below.
- E. In order to ensure that each identified Indian tribe or NHO has a full opportunity to participate in the Section 106 process and to request government-to-government consultation, the Applicant shall, early in the project planning process, contact in writing any Indian tribe or NHO identified pursuant to Section IV D above. The communication shall include the elements specified in Section V C, below, and offer the Indian tribe or NHO an opportunity to provide to the Applicant information about Historic Properties in the APE that should be considered and included in the Submission Packet. The initial communication should explain the Applicant's authority and the tribe's right to request government-to-government consultation as outlined in Section IV.A. and B above.

- F. The Applicant must ensure that each identified Indian tribe or NHO has a reasonable opportunity to respond to its communication. Ordinarily, 30 days from the time the relevant tribal representative may reasonably be expected to have received an inquiry shall be considered a reasonable time, and in no event shall a reasonable time be less than 30 days unless otherwise agreed by a tribe. Should the tribe request additional time to respond, the Applicant shall afford additional time as reasonable under the circumstances. Notification to the Applicant of the need for additional time should be made, where practical, at least 5 days prior to the close of the initial 30-day period. In general, an Applicant should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make reasonable efforts to follow up. Such efforts may include, for example, an additional attempt at written communication, provision of the Submission Packet at the time it is submitted to the SHPO/THPO, and/or, where practical, contact by telephone.⁷
- G. If the Applicant receives a comment or objection from an Indian tribe or NHO regarding Historic Properties, the Applicant shall pursue further discussions with the tribe, unless the tribe requests consultation with the Commission. All requests for government-to-government consultation shall be immediately forwarded to the Commission. If the Applicant receives a comment from an Indian tribe or NHO, it shall invite the commenting tribe or organization to become a consulting party. If the Indian tribe or NHO agrees to become a consulting party, it shall be afforded that status and shall be provided with all of the information, copies of submissions, and other prerogatives of a consulting party as provided for in 36 C.F.R. § 800.2.
- H. The Applicant shall submit to each Indian tribe and NHO that it has identified pursuant to Section IV D., above, or that has informed the SHPO/THPO, the Applicant or the Commission that it attaches religious and cultural significance to a Historic Property within the APE, a Submission Packet as provided in Section VII A. Such submission is not necessary where the Indian tribe or NHO has previously made clear that it does not believe any Historic Property of religious and cultural significance to it may potentially be affected or has failed to respond to repeated attempts at communication.

⁷ PCIA has expressed concern that this paragraph is difficult to apply and understand because its timing is indefinite. The Conference believes the Programmatic Agreement should not add deadlines to those already in 36 C.F.R. Part 800.

- I. In the event an Applicant and an Indian tribe or NHO are unable to agree regarding a tribe's assertion prior to construction of an adverse effect on a Historic Property of religious and cultural significance to that tribe, the Applicant shall not commence construction without authorization from the Commission. The Commission, in consultation with the tribe, shall carefully consider all positions and rule on all such disagreements with reasonable promptness.
- J. Information regarding Historic Properties to which Indian tribes attach religious and cultural significance may be highly confidential, private, and sensitive. If a tribe or NHO requests confidentiality from the Applicant, the Applicant shall honor this request and shall, in turn, request confidential treatment of such materials or information in accordance with Section 304 of the NHPA (16 U.S.C. § 470w-3(a)) in the event they are submitted to the Commission. The Commission shall provide such confidential treatment consistent with applicable federal laws.⁸
- K. Nothing in this Section shall be construed to prohibit or limit Applicants and Indian tribes from entering into or continuing pre-existing arrangements or agreements governing their contacts, provided such arrangements or agreements are otherwise consistent with federal law.

"The EBCI/THPO will not agree with Alternative A"

"The EBCI/THPO is agreeing and recommending that FCC place Alternative B into the PA."

V. PARTICIPATION OF INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS IN UNDERTAKINGS OFF TRIBAL LANDS – Alternative B⁹

⁸ The Conference notes that "The confidentiality provision in the National Historic Preservation Act is equally applicable to all historic properties not just traditional cultural properties. The reasons for withholding information are significant invasion of privacy, risk of harm to the resource and impeding the use of a traditional cultural property." The Council proposes that this provision be revised to read as follows: "If a Tribe or Native Hawaiian Organization requests confidentiality from the Applicant, the Applicant shall notify the Commission. The Commission shall honor this request and shall, in turn, request confidential treatment of such materials or information consistent with applicable Federal laws." USET states that confidentiality is of central importance to tribes and that confidentiality restrictions should be in place on Applicants whether or not a tribe or NHO has requested confidentiality.

⁹ This alternative is proposed by the United South and Eastern Tribes, Inc. USET argues that Alternative A is an unlawful delegation to non-governmental entities of the Commission's obligation under both Section

VI

- A. The Commission recognizes its responsibility to initiate and carry out consultation with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by a Commission undertaking. This responsibility is founded in Sections 101(d)(6)(a-b) and 106 of the NHPA (16 U.S.C. §§ 470a(d)(6)(a-b) and 470f), the regulations of the Council (36 C.F.R. Part 800), the Commission's environmental regulations (47 C.F.R. §§ 1.1301-1.1319), and the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions. This historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. (*Commission Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*).
- B. Except as provided in Section IV.C. below, the Commission shall engage in direct and meaningful consultation with an Indian tribe or NHO when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO. Such consultation shall be carried out in accordance with the regulations adopted by the Advisory Council on Historic Preservation implementing Section 106 of the NHPA (codified at 36 C.F.R. Part 800). Notwithstanding the foregoing, the Commission encourages the use of the alternative process set forth in Paragraph C as an effective way of addressing the concerns of Applicants and Indian Tribes or NHOs that generally will be faster than government-to-government consultation between the Commission and Indian tribes or NHOs.
- C. The Commission shall not be required to engage in consultation with an Indian tribe or NHO where an Applicant has secured a letter of certification from that Indian tribe or NHO stating that such consultation is unnecessary because either: (1) the tribe or NHO has no interest in the affected property; or (2) the Undertaking will not have an adverse effect on a Historic Property of religious and cultural significance to that tribe or NHO. Where a tribe or NHO believes

101(d)(6) and the Federal trust responsibility to consult with tribes. USET proposes Alternative B as a practical solution to this problem that maintains the Commission's consultation obligation, addresses the concerns of industry in a timely manner, and enables tribes to provide their expertise for the identification and evaluation of sites thus contributing to the appropriate preservation of those sites of value to tribes. USET states that it is committed to supporting implementation of Alternative B in a practical manner that works for all parties.

that a proposed Undertaking would have an adverse effect on a property of religious and cultural significance to that tribe or NHO and the Applicant wishes to pursue mitigation, the tribe or NHO may, at its discretion, discuss mitigation directly with the Applicant consistent with Section VII.D. Alternatively, consultation shall not be required if a written agreement between the Applicant and the tribe or NHO that has been filed with the Commission provides that the tribe or NHO will be deemed to have determined that Commission consultation is unnecessary if the Applicant has provided certain information and the tribe or NHO has not responded within a certain period of time, and the Applicant has fulfilled the terms of that agreement. [Additional guidance in implementing this paragraph would be provided either in an appendix or by separate publication].

"The EBCI/THPO is agreeing and recommending that FCC place Alternative B into the PA as the Navaho Nation and USET has requested."

PUBLIC PARTICIPATION AND CONSULTING PARTIES

- A. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide the local government that has primary land use jurisdiction over the site of the planned Undertaking with written notification of the planned Undertaking.
- B. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide written notice to the public of the planned Undertaking. Such notice may be accomplished (1) through the public notification provisions of the relevant local zoning or local historic preservation process for the proposed Facility; or (2) by publication in a local newspaper of general circulation. In the alternative, an Applicant may use other appropriate means of providing public notice, including seeking the assistance of the local government.
- C. The written notice to the local government and to the public shall include: (1) the location of the proposed Facility including its street address; (2) a description of the proposed Facility including its height and type of structure; (3) instruction on how to submit comments regarding potential effects on Historic Properties; and (4) the name, address, and telephone number of a contact person.